IN THE SUPREME COURT OF THE
UNITED STATES
OCTOBER 1992 TERM

DIANA M. MAULDING PETITIONER

v. No. 92-762

LOUIS W. SULLIVAN, Secretary
of Department of Health and
Human Services; DEPARTMENT
OF HEALTH AND HUMAN SERVICES
RESPONDENTS

Reply to Respondents' Brief in Opposition
to Petitioner's Petition for a Writ of
Certiorari

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EDITOR'S NOTE

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Petitioner takes issue with the following arguments raised in the brief in opposition

**Brief in opposition p. 7

"The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals."

a. The district court and the court of appeals did NOT follow a decision of this court nor federal law. Department of Navy v. Egan, 108 S. Ct. 818 (1988) is virtually a clone fact pattern to the instant case and clearly shows that it is the employing agency's decision that the MSPB is to review and develope an evidentiary record while doing the review. Then, the district court examines that record to determine if the employing agency's decision was in

accordance with 5 U.S.C. Sec. 7703(c). Neither the district court nor the court of appeals in the instant case followed Egan; both looked only at the final MSPB decision in the context of 7703(c) and they should have looked at the WHOLE RECORD, of which the final decision is only a part and assuredly not part of the evidentiary record at that. Petitioner never worked for the MSPB, DHHS was the employing agency.

b. Respondents do not cite to any authority that there is no conflict between the circuits as to whether judicial review after a case goes through the MSPB is of the MSPB decision or the employing agency's actions toward the employee for the excellent reason there is no authority to support this argument. Petitioner stands by her cites.

c. The MSPB ALJ made credibility based findings of fact. The full Board disagreed without good reason and simply supplanted its views for those of the ALJ in this area. The district court and the court of appeals erred in not following the holding in Universal Camera Corp. v. N.L.R.B., 71 S. Ct. 456 (1951).

d. The court of appeals erred when it changed the standard in Whirlpool Corp. v. Marshall, 445 U.S. 1 (1980) from reasonable to justifiable. Whirlpool Corp. held that an employee may refuse to perform a work assignment if the employee has a reasonable fear for his safety or life. "Justifiable" is different from reasonable.

**Brief in opposition, p. 8 "In reviewing the MSPB's decision, the courts below extensively examined the facts underlying petitioner's termination to determine

whether the MSPB's decision should be affirmed."

This is not true. From the post-hearing MSPB brief forward, the Respondents have made claims that were picked up by both the district court and court of appeals as facts substantiated by the record. Petitioner pointed out that these "facts" were not in the record in a motion and brief devoted soley to this issue to the district court and also the "facts" were brought to the court of appeals' attention but clearly neither court checked the evidentiary record because those "facts" developed a life of their own completely independent of the record.

For example, the Respondents note that Petitioner never contacted the agency after she left May 13, 1988 as a result of what Petitioner contends was a

constructive termination on that date. (Brief in Opp. p. 4) If the Respondents or either court had ever checked the record, they would have discovered two letters from Petitioner and one from her attorney, all written after May 13, 1988, and all with some sort of receipt notation on the face thereof that had been made BY THE AGENCY. The list of such "facts" went on for several pages the first time it was presented to the district court.

The statement made by the Respondents in their brief in opposition contains no less than seven of these "facts" after only a cursory review. These "facts" must be critical to the courts and the agency or they would not have appeared with such regularity below.

Brief in Opposition, page 8.

"Petitioner also argues that the courts below erred by reviewing the final decision of the MSPB instead of the ALJ's decision."

Apparently Petitioner was not clear. Neither the ALJ's nor the final MSPB decision are reviewed under 5 U.S.C. Sec. 7703(c). The evidentiary record created by the MSPB adjudicatory process is reviewed as it memorializes the employing agency's actions. The term "evidentiary record" is defined by regulation. 5 C.F.R. Sec. 1201.54. It is the employing agency's actions that the district court should judicially review. "Agency" in 5 U.S.C. Sec. 7703(c) means the agency that took the action which resulted in the trip to the MSPB then on to court. The MSPB is itself reviewing, for lack of a better word, the employing agency's action. 5 C.F.R. Sec. 1201.3.

**Brief in opposition, p. 8

"'[T]he Board's reversal of the AlJ's decision turned on its assessment of the adequacy of the medical evidence petitioner submitted to her supervisors concerning her alleged allergies' and not the ALJ's credibility findings."

Again, no. The ALJ found Petitioner credible when Petitioner testified that she had the solvent-induced breathing problem and produced all the available medical records and the 1985 Dr. Strauss letter. The Dr.Strauss letter in the record was the agency's copy as it had their receipt marks on it.

The ALJ found that Petitioner had met her burden on the medical records as the agency had not just asked for medical records nor asked Petitioner to undergo tests of the agency's choosing at the hands of a doctor of the agency's

choosing in order for Petitioner to avoid the lab assignment. The agency, charged with stamping out medical quackery and fraud, had its medical advisor Dr. Smith devise only-one-doctor-in-the-U.S.-does them medical tests request in July 1987, scarcely a month after Petitioner had turned the agency in to OPM over the Peer Review. The medical records issue related exclusively to the constructive termination charge, initially, then later became an issue in the handicapping claim. The ALJ found that the burden of production had been met by Petitioner when Petitioner testified and put into evidence without objection by the agency an affidavit by Dr. Mark Strauss to the effect that he had never heard of the inhalational toxicity or challenge tests the agency asked Petitioner to produce.

These were the only tests the agency would accept and as the existence and name of the one U. S. doctor who did them was revealed by the agency at the mid-December 1988 MSPB hearing, the ALJ held it was reasonable for Petitioner to not be able to produce them at the agency's demand back in the spring of 1988.

Bluntly restated, the ALJ did not believe the agency's position that the tests were readily available and Petitioner could have had them done if Petitioner had chosen to do so. The district court and court of appeals erred when they did not follow Universal Camera and set aside the ALJ's credibility findings.

**Brief in opposition, p. 9 Handicap argument, particularly the footnote.

Petitioner put on, without objection by the agency, proof that Petitioner had had the solvent-induced breathing problem from 1974 forward although Petitioner was not aware it was life-threatening until 1985 when she got the letter from Dr. Strauss. Both the letter and the content of the discussion was relayed to the agency. Petitioner put on a record of having an impairment. Further, by its actions in rescinding the 1985 lab assignment, the agency certainly regarded Petitioner as having the impairment, i.e. lung problems brought on by the 1974 phosgene exposure.

There was abundant proof in the record for the district court and court of appeals to find that Petitioner had met two of the three disjunctively set out basis in the handicapping law and only one had to be met if all

were joined by "or." Handicapping is provable by more than just medical records, according to the code, and certainly provable without having to undergo tests that only one U.S. doctor may or may not do.

**Brief in Opposition, p. 10.

Respondents somehow confuse Whirlpool Corp. v. Marshall, 445 U.S.1 (1980) as having something to do with the handicap claim. Not so. This ties is directly with the constructive termination claim raised before the MSPB and it was the ALJ that pointed out that an employee cannot be terminated for having a reasonable fear of performing a task at work.

Respondents also mistakenly state five years into this case on p. 10 that Petitioner was fired for refusing to go into the labs. Again, not so. Petitioner was cut to 8 hours in an office per week,

the balance to be in the labs or AWOL unless Petitioner could produce the only-one-doctor-does-them test results. Obviously, Petitioner could not produce the results. This cut was made May 13, 1988.

Petitioner left May 13, 1988 to find another job. The agency left Petitioner on the payroll system and logged all time from May 13, 1988 forward as AWOL. This AWOL, which spanned the greater part of the summer of 1988, was one basis for termination. The second basis was a failure to communicate with the agency after May 13, 1988 and in the teeth of letters to the contrary bearing receipt marks placed thereon by the agency, the agency held that it had not heard from Petitioner from May 13, 1988 forward. Those letters are in the evidentiary record of the MSPB and that

in turn was an evidentiary exhibit before the district court.

Basically, the agency just wanted a whistleblower who had turned them in to OPM over Peer Review gone. Petitioner had 13 years of good to excellent performance appraisals. Petitioner was not an employee likely to create cause for her dismissal so in stepped the agency with its one-Denver-doctor-does-them-but-we-won't-tell-her-that medical test request. In the process of this devious little plan, the agency contravened the handicapping discrimination code and others not on appeal.

**Brief in opposition, p. 10-11, Privacy Act claims.

There is absolutely nothing in the record that detracted from any of the proofs on the Privacy Act claim. The agency sat placidly through the district

court trial as evidence was introduced to establish that not only did the requested information fit the Privacy Act but the form used to request the protected information did not comply with the Privacy Act.

If courts of appeals can pick and choose what claims they will hear, that is an impermissable assumption of the power of certiorari; it is a rewriting of the Constitution which gives only the United States Supreme Court the discretion as to which otherwise jurisdictionally correct appeals it hears. May it hear this one.

Respectfully submitted,

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